Ramli bin Samad v Pacific & Orient Insurance Co Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–188 OF 2006
JAMES FOONG, HELILIAH FCJJ AND ABDUL MALIK ISHAK JCA
20 NOVEMBER 2009

Labour Law — Injury — In the course of employment — Action against co-employee — Judgment sum — Insurance — Liability of insurer to satisfy judgment sum against insured co-employee — Co-employee contributing under Employees' Social Security Act 1969 — Whether s 31 of the Employees' Social Security Act 1969 prohibited recovering from co-employee — Whether s 31 debarred claim for common law damages — Employees' Social Security Act 1969 s 31

Road Traffic — Insurance — Judgment sum — Liability of insurer to satisfy judgment sum obtained against insured co-employee — Co-employee contributing under Employees' Social Security Act 1969 — Whether s 31 of the Employees' Social Security Act 1969 prohibited recovery of judgment sum from co-employee

The appellant, an employee of Syarikat Pengangkutan Sri Selatan Sdn Bhd, was seriously injured during the course of his employment when a gas tank fell on him from his employer's lorry driven by his co-worker. The accident happened when the lorry, while reversing, hit a pot hole and caused the gas tanks, which were then on the lorry, to fall off and hit the appellant. The appellant instituted a negligence action in the sessions court against the co-employee and the employer, the first defendant and second defendant, respectively. The appellant was a contributor to the Employees' Social Security created under the Employees' Social Security Act 1969 ('the SOCSO Act'). When this was disclosed, both the employer and co-employee amended their defences alleging that the appellant's claim was barred by s 31 of the SOCSO Act. Upon this, the appellant withdrew his claim against the employer but maintained his action against the co-employee. On the day fixed for hearing, the co-employee failed to turn up in court and accordingly, an interlocutory judgment was entered against him and the damages assessed was at RM90,992 with costs amounting to RM6,790.50. Since the injury of the appellant was the result of a road accident, the appellant gave notice to the respondent, as the insurer, under s 96(2) of the Road Transport Act 1987 ('RTA') of a third party risks policy taken by the employer for the motor lorry. The respondent refused to satisfy the said judgment and this resulted in the appellant commencing this recovery action against the respondent under s 96(1) of the RTA. The appellant's claim was dismissed by the sessions court

on the ground that his action was barred against the employer and co-employee by virtue of an amendment to s 31 vide the Employees Social Security (Amendment) Act 1992 which applied retrospectively. Dissatisfied with this, the appellant appealed to the High Court. His appeal was dismissed on the same ground as the sessions court and in addition, the court was of the view that since the judgment in the negligence action was not against the employer as the insured, this recovery action could not be maintained against the respondent. Against the decision of the High Court, the appellant appealed to this court and raised the following three grounds: (i) that s 31 did not prohibit a claim by the appellant for common law damages; (ii) the interlocutory judgment against the co-employee was obtained before the amended s 31 came into effect and therefore, based on the ruling in *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ 74 ('*Tan Peng Loh*'), the appellant was not prohibited from recovering the said sum from the co-employee; and (iii) in the negligence action, both the employer and co-employee had amended their defences to include s 31 of the SOCSO Act and as the respondent had assumed the role of employer and co-employee, the same line of defence could not be raised again when it was previously abandoned by the employer and co-employee. In other words, the respondent could not re-agitate the same issue.

Held, dismissing the appeal with costs:

(1) (per **James Foong FCJ** and **Heliliah FCJ**) Even if the appellant succeeded in claiming against the employer and co-employee for damages under common law, the amended s 31 expressly provides that the appellant as an insured person shall not be entitled to receive or recover from the employer and co-employee damages under any other law. This prohibition extended to the respondent as insurer by virtue of s 96(1) of the RTA for having issued a third party risks policy covering the employer and/or the co-employee. That is only a natural extension since the liability of the insured had been taken over by the insurer (see para 21).

(2) (per **James Foong FCJ** and **Heliliah FCJ**) An interlocutory judgment is a judgment for damages to be assessed. It is not a final decision and therefore, it cannot be used to enforce a claim against an insurer in a recovery action. Section 96(1) of the RTA demanded that the insurer pays to the person entitled to the benefit of the judgment 'any sum payable'. This phrase 'any sum payable' referred to a judgment which had damages ascertained rather than one of an interlocutory nature with damages still awaiting to be assessed. That must be the intention of the Legislature. So liability of the respondent as an insurer to pay could only come into effect after damages was assessed and by the time it was assessed, s 31 of the SOCSO Act 1992 was gazetted making this new provision of the law retrospective (see para 23).

(3) (per **James Foong FCJ** and **Heliliah FCJ**) The employer did not abandon the defence in the negligence action. It was the appellant who withdrew his claim against the employer. It was therefore incorrect to allege that the issue had been litigated. As regards to the co-employee, the issue was never abandoned. It was just not litigated when the appellant obtained judgment in default against the co-employee. As the defence was never litigated or abandoned, the doctrine of res judicata was not applicable (see paras 25–26).

(4) (per **Abdul Malik Ishak JCA**) The original version of s 31 of the SOCSO Act was amended to disallow an employee to even pursue a claim against his fellow employer or co-worker. The amendment was obviously made to whittle down and circumvent the decision of *Tan Peng Loh*. Of significance was that the amendment to s 31 was made retrospective to take effect far back to a date before the appellant had the accident. Legally speaking the amendment would have prevented the appellant from filing the initial action against his employer or his co-employee (see para 41).

(5) (per **Abdul Malik Ishak JCA**) The principle of res judicata did not apply. The second defendant did not abandon the defence under s 31 in the initial action. Rather, it was the appellant who withdrew his claim against the second defendant. Thus, leaving intact the defence under the original version of s 31. And in so far as the co-employee was concerned, the defence under the original version of s 31 was never litigated nor abandoned (see paras 52–53).

(6) (per **Abdul Malik Ishak JCA**) An insurance company only indemnifies the insured when there is a judgment against the insured. In the present case, since no judgment was obtained against the employer as the insured, there was nothing for the insurer to indemnify. Hence, any action against the respondent, must therefore, be dismissed forthwith (see paras 61–62).

[Bahasa Malaysia summary

Perayu, seorang pekerja Syarikat Pengangkutan Sri Selatan Sdn Bhd, telah mengalami kecederaan teruk semasa bekerja apabila sebuah tangki gas terjatuh ke atas lori majikannya yang dipandu oleh rakan sekerjanya. Kemalangan itu berlaku apabila lori itu, semasa mengundur, terlanggar lubang jalan dan mengakibatkan tangki-tangki gas tersebut yang berada atas lori, terjatuh dan menimpa perayu. Perayu telah memulakan tindakan kecuaian di mahkamah sesyen terhadap rakan sekerja tersebut dan majikannya, masing-masingnya defendan pertama dan defendan kedua. Perayu merupakan penyumbang kepada Keselamatan Sosial Pekerja yang ditubuhkan dibawah 1969 ('Akta SOCSO'). Apabila ini didedahkan, kedua-dua majikan dan rakan sekerja tersebut telah meminda pembelaan

mereka dengan mengatakan bahawa tuntutan perayu dihalang oleh s 31 Akta SOCSO. Berdasarkan ini, perayu telah menarik balik tuntutannya terhadap majikannya tetapi mengekalkan tindakannya terhadap rakan sekerja tersebut. Pada hari yang ditetapkan untuk perbicaraan, rakan sekerja tersebut gagal hadir di mahkamah dan sewajarnya, penghakiman interlokutori telah dimasukkan terhadapnya dan ganti rugi yang ditaksirkan sejumlah RM90,992 dengan kos sejumlah RM6,790.50. Memandangkan kecederaan perayu adalah akibat daripada kemalangan jalan raya, perayu telah memberi notis kepada responden, sebagai syarikat insurans, di bawah s 96(2) Akta Pengangkutan Jalan 1987 ('APJ') mengenai polisi risiko pihak ketiga yang diambil oleh majikan untuk motor lori itu. Responden enggan mematuhi penghakiman tersebut dan ini menyebabkan perayu memulakan tindakan untuk mendapatkan semula terhadap responden di bawah s 96(1) APJ. Tuntutan perayu ditolak oleh mahkamah sesyen atas alasan tindakannya terhadap majikan dan rakan sekerja dihalang menurut pindaan kepada s 31 Akta Keselamatan Sosial Pekerja (Pindaan) 1992 yang terpakai kebelakangan. Berasa tidak puas hati dengan perkara ini, perayu telah merayu ke Mahkamah Tinggi. Rayuannya ditolak atas alasan sama seperti mahkamah sesyen dan tambahan pula, mahkamah berpendapat bahawa memandangkan penghakiman dalam tindakan kecuaian bukan terhadap majikan sebagai pengambil insurans, tindakan untuk mendapatkan semula ini tidak boleh dikekalkan terhadap responden. Perayu telah merayu ke mahkamah ini terhadap keputusan Mahkamah Tinggi dan membangkitkan tiga alasan berikut: (i) bahawa s 31 tidak menghalang tuntutan oleh perayu untuk ganti rugi *common law*; (ii) penghakiman interlokutori terhadap rakan sekerja telah diperoleh sebelum pindaan s 31 berkuat kuasa dan oleh itu, berdasarkan keputusan dalam kes *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ 74 ('*Tan Peng Loh*'), perayu tidak dilarang daripada mendapatkan semula jumlah tersebut daripada rakan sekerjanya; dan (iii) dalam tindakan kecuaian, kedua-dua majikan dan rakan sekerja tersebut telah meminda pembelaan mereka untuk memasukkan s 31 Akta SOCSO dan oleh kerana responden telah mengambil alih peranan majikan dan rakan sekerja tersebut, pembelaan yang sama tidak boleh dibangkitkan semula apabila yang sebelumnya telah dibatalkan oleh majikan dan rakan sekerja tersebut. Dalam erti kata lain, responden tidak boleh mengganggu isu yang sama.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **James Foong HMP** dan **Heliliah HMP**) Meskipun perayu berjaya dalam tuntutan terhadap majikan dan rakan sekerja bagi ganti rugi di bawah *common law*, s 31 yang dipinda dengan jelas memperuntukkan bahawa perayu sebagai pengambil insurans tidak berhak menerima atau mendapat semula daripada majikan dan rakan sekerja ganti rugi di bawah undang-undang lain. Larangan ini dilanjutkan kepada responden sebagai pengambil insurans menurut

A s 96(1) APJ kerana telah mengeluarkan polisi pihak ketiga yang melindungi majikan dan/atau rakan sekerja tersebut. Itulah satu-satunya lanjutan yang biasa memandangkan liabiliti pengambil insurans telah diambil alih oleh syarikat insurans (lihat perenggan 21).

B (2) (oleh **James Foong HMP** dan **Heliliah HMP**) Penghakiman interlokutori adalah penghakiman untuk penaksiran ganti rugi. Ia bukan keputusan muktamad dan oleh itu, ia tidak boleh digunakan untuk menguatkuasakan tuntutan terhadap syarikat insurans dalam tindakan untuk mendapatkan semula. Seksyen 96(1) APJ menuntut
C syarikat insurans membayar seseorang yang berhak mendapat manfaat 'any sum payable' daripada penghakiman tersebut. Ungkapan ini, 'any sum payable', merujuk kepada penghakiman yang mana ganti rugi telah ditentukan dan bukan bersifat interlokutori yang mana ganti rugi masih perlu ditaksirkan. Itulah niat badan perundangan. Oleh demikian
D liabiliti responden sebagai syarikat insurans untuk membayar hanya timbul selepas ganti rugi ditaksirkan dan sebelum ia ditaksirkan, s 31 Akta SOCSO 1992 telah diwartakan menjadikan peruntukan baru ini undang-undang kebelakangan (lihat perenggan 23).

E (3) (oleh **James Foong HMP** dan **Heliliah HMP**) Majikan tidak membatalkan pembelaan dalam tindakan kecuaian. Perayulah yang telah menarik balik tuntutannya terhadap majikan. Oleh itu adalah salah untuk mengatakan bahawa isu tersebut telah dibicarakan. Berhubung rakan sekerja itu, isu itu tidak dibatalkan. Ia hanya tidak dibicarakan apabila perayu memperoleh penghakiman ingkar terhadap
F rakan sekerja itu. Oleh kerana pembelaan tidak pernah dibicarakan atau dibatalkan, doktrin res judicata tidak terpakai (lihat perenggan 25–26).

(4) (oleh **Abdul Malik Ishak HMR**) Versi asal s 31 Akta SOCSO telah dipinda untuk tidak membenarkan seorang pekerja meneruskan
G tuntutan terhadap majikan atau rakan sekerjanya. Pindaan ini jelas dibuat untuk melemahkan dan memintas keputusan kes *Tan Peng Loh*. Yang penting pindaan kepada s 31 telah dibuat secara kebelakangan untuk memberi kesan ke belakang sehingga suatu tarikh sebelum perayu mengalami kemalangan itu. Jika bercakap dari segi
H undang-undang pindaan itu akan melarang perayu daripada memfailkan tindakan awal terhadap majikannya atau rakan sekerjanya (lihat perenggan 41).

(5) (oleh **Abdul Malik Ishak HMR**) Prinsip res judicate tidak beraplikasi. Defendan kedua tidak menggugurkan pembelaan di bawah s 31 di
I dalam tindakan awal. Sebaliknya, is adalah perayu yang menarik balik tuntutannya terhadap defendan kedua. Oleh itu, membiarkan pembelaan di bawah versi asal s 31. Dan setakat yang melibatkan pekerja bersama, pembelaan di bawah versi asal s 31 tidak pernah dibicarakan atay digugurkan (lihat perenggan 52–53).

(6) (oleh **Abdul Malik Ishak HMR**) Sebuah syarikat insurans hanya melindungi pengambil insurans apabila terdapat penghakiman terhadap pengambil insurans itu. Dalam kes ini, memandangkan tiada penghakiman telah diperoleh terhadap majikan sebagai pengambil insurans, maka tiada apa-apa untuk dilindungi oleh syarikat insurans. Justeru itu, apa-apa tindakan terhadap responden, hendaklah dengan itu, ditolak dengan serta-merta (lihat perenggan 61–62).]

Notes

For a case on judgment sum, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) para 197.

For cases on labour law in general, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 798–1859.

Cases referred to

A Solicitor's Clerk, Re [1957] 1 WLR 1219, QBD (refd)
Basser v Medical Board of Victoria [1981] VR 953 (refd)
Chamberlain v Deputy Commissioner of Taxation (1988) 164 CLR 502, FC (refd)
Cole v Austin Distributors Ltd [1953] VLR 155 (refd)
Henderson v Henderson (1843) 3 Hare 100 (refd)
Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1; [2001] 2 WLR 72, HL (refd)
Maganja v Arthur [1984] 3 NSWLR 561 (refd)
Pinnock Bros v Lewis and Peat, Ltd [1923] 1 KB 690 (refd)
Pople v Evans [1969] 2 Ch 255 (refd)
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589 (refd)
Queen, on the Prosecution of Certain Justices of Leeds, The v Vine (1875) LR 10 QB 195 (refd)
Rafiah bte Bakar v East West-UMI Insurance Bhd [1993] 1 MLJ 39; [1992] 1 AMR 440, HC (refd)
Ramli Shahdan & Anor v Motor Insurer's Bureau of West Malaysia & Anor [2006] 1 CLJ 224, CA (refd)
Reid v Reid (1886) 31 Ch D 402, CA (refd)
Sambu Pernas Construction & Anor v Pitchakkaran [1982] 1 MLJ 269, FC (refd)
Satyadhyan Ghosel & Ors v Sint Deorajin Dobi & Anor AIR 1960 SC 941 (refd)
Tan Peng Loh v Lee Aik Fong & Anor [1982] 1 MLJ 74, FC (refd)
West v Gwynne [1911] 2 Ch 1, CA (refd)

Legislation referred to

Employees' Social Security Act 1969 s 31

Employees' Social Security (Amendment) Act 1992 ss 1, 31
Road Transport Act 1987 ss 90(1), 91(1)(b), 96(1), (2)
Solicitors (Amendment) Act 1956 [UK] s 11(1)
Wine and Beer Amendment Act 1870 [UK] s 14

Appeal from: Civil Appeal No R1–12–757 of 2003 (High Court, Kuala Lumpur)

Americk Sidhu (Isharidah, Ho Chong & Menon) for the appellant.
S Kanagasabapathi (Kanaga, Suresh & Co) for the respondent.

James Foong FCJ:

BACKGROUND

[1] The appellant was an employee of Syarikat Pengangkutan Sri Selatan Sdn Bhd ('the employer'). On or about 12 June 1987, in the course of his employment he was injured by a gas tank which fell on him from his employer's motor lorry bearing registration No WBE 3310. This lorry was, at the material time, driven by his co-worker one Ramli bin Osman ('co-employee'). The accident happened when the lorry, while reversing, hit a pot hole and caused the gas tanks which were then on the lorry to fall off and hit the plaintiff. As a result of this accident, the appellant was injured.

[2] The appellant instituted a civil action in the Sessions Court at Kuala Lumpur bearing No 63–399 of 1988 against the co-employee as the first defendant and the employer as the second defendant. I shall refer to this civil action as the negligence action.

[3] In the course of the negligence action, it came to light that the appellant was a contributor to the Employees' Social Security created under the Employees' Social Security Act 1969 ('SOCSO Act 1969').

[4] Under s 31 of the SOCSO Act 1969:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person:
>
> (i) any compensation under the Workmen's Compensation Ordinance, 1952, or
>
> (ii) damages under any other law for the time being in force, in respect of an employment injury sustained as an employee under this Act. (Emphasis added.)

[5] When this was disclosed, both the employer and co-employee amended their defences to make use of this provision of the law. Upon this, appellant withdrew his claim against the employer but maintained his action against the co-employee. As both employer and co-employee had engaged a common solicitor to defend them in this action, this solicitor discharged himself from acting for the co-employee. On 17 January 1992 which was the day fixed for hearing, the co-employee failed to turn up in court. As a result of this, interlocutory judgment was entered against him with damages to be assessed. On 19 September 1992, damages was assessed at RM90,992 with interest thereon and costs at RM6,790.50.

[6] Since the injury of the appellant was as a result of a road accident, the appellant gave notice to the respondent, as insurer under s 96(2) of the Road Transport Act 1987 ('RTA') of a third part risks policy taken by the employer for the motor lorry. The respondent refused to satisfy the judgment sum obtained in the negligent action. This resulted in the appellant commencing this recovery action (recovery action) against the respondent under s 96(1) of the RTA. This section specifies:

> If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable hereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

[7] The respondent defence in this recovery action was principally this: the appellant is prohibited from bringing this action against both employer and co-employee under s 31(i) and (ii) of the Employees' Social Security (Amendment) Act 1992 ('SOSCO Act 1992').

[8] One must be reminded that when the recovery action was filed, s 31 of the SOCSO Act 1969 had been amended by the SOSCO Act of 1992. This new s 31 of the SOSCO Act of 1992 reads:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, *or from any other person who is a servant of the employer*, any compensation or damages under any law for the time being in force in respect of an employment injury sustained as an employee under this Act. (Emphasis added.)

[9] The new addition (as emphasised above) to s 31 of the SOSCO Act was due to the Federal Court judgment in *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ 74 which says 'that in the absence of express exclusion of fellow employees (in s 31 of the SOSCO Act 1969) the right to recover from the first respondent, a fellow employee remains'.

[10] Section 31 of the SOSCO Act 1992 therefore reversed the law regarding 'fellow employee' mentioned in *Tan Peng Loh v Lee Aik Fong & Anor*. In addition to this, this amendment was to take effect retrospectively by virtue of s 1 of the SOCSO Act 1992 which says:

> Section 31 shall be deemed to have come into force on 1st July 1985.

[11] It is upon these provisions of the SOSCO Act 1992 that the respondent in this appeal before us maintained that the appellant's recovery action against them should be dismissed.

[12] I shall now give a chronology of events relating to the recovery action. The appellant initiated this recovery action in the sessions court. After a full trial, the sessions court dismissed this appellants' claim on the ground that the appellant was not allowed to bring an action against the employer and the co-employee by virtue of s 31 of the SOSCO Act 1992 (made retrospective to 1 July 1985 to include the time of the appellant's accident) and a fortiori similarly barred the appellant from bringing this recovery action against the respondent.

[13] Dissatisfied with this, the appellant appealed to the High Court. His appeal was dismissed on the same ground as the sessions court with the addition that since the judgment in the negligence action was not against the employer as the insured, this recovery action cannot be maintained against the respondent.

[14] It is on this decision of the High Court that this appeal is before this court.

[15] In this appeal, the appellant relied basically on three grounds. I shall deal with each in turn. But before I do so, allow me to comment on the part of the judgment of the High Court relating to the conclusion that since the judgment in the negligence action was not against the employer, the recovery action cannot succeed.

[16] I would first like to point out that s 90(1) of the RTA specifies that:

> it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.

[17] And under s 91(1)(b) of the RTA, such a third party risks insurance policy must be a policy which:

> insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road: ...

[18] When such an insurance policy covers 'such person, or class of persons as may be specified in the policy', the insured would include not only the employer but also the co-employee for whom the employer had given permission to drive the lorry at the material time of the accident. This relationship of a master and servant and/or agent related between the employer and the co-employee was pleaded by the appellant in his statement of claim in the negligence action. Thus, when judgment was obtained against the co-employee who drove the lorry with the consent of the employer, the compulsory insurance policy against third party risks was effective for the purpose of a recovery claim against the insurer. It is therefore incorrect for the High Court to say that because no judgment was obtained against the employer, a recovery action against the respondent cannot succeed.

[19] I shall now deal with each of the grounds raised in this appeal.

First issue: Incorrect assumption of s 31 of the SOSCO Act 1992

[20] Though admitting that s 31 of the SOSCO Act bars a claim against an employer and a co-employee, Mr Americk Sidhu however argued that this does not prohibit a claim by the appellant for common law damages. He explained that the SOCSO scheme set up by SOSCO Act involves collecting contributions from the employer for payment to an injured or disable workman based on the extent of hits disability. However, under this scheme there is no award for pain and suffering and for loss of amenities. These common law damages were deprived from the injured worker and for this he submitted that:

> ... to correctly interpret the intended meaning of s 31 as anticipated by the legislature to mean that an injured employee should not be prevented from pursuing the recovery of compensation he or she is entitled to obtain from any other party, other than his employer, either directly or indirectly only because this would necessarily involved bringing an action against his or her employer or co-employer …
>
> The bringing of an action against the employer or a co-employer is a right that has never been taken away from an injured employee by statute. The only right that an injured employee has been deprived of is the right to receive or recover any compensation directly from his employer or co-employee.

[21] I find this argument unacceptable. Even if the appellant may succeed in claiming against the employer and co-employee for damages under common law, how is he going to receive or recover this in view of s 31 of the SOSCO Act 1992 which expressly says that the appellant as an insured person shall not be entitled to receive or recover from the employer and co-employee damages under any other law? And this prohibition, in my considered opinion, extends to the respondent as insurer by virtue of s 96(1) of the RTA for having issued a third party risks policy covering the employer and/or the co-employee — see *Ramli Shahdan & Anor v Motor Insurer's Bureau of West Malaysia & Anor* [2006] 1 CLJ 224 and *Rafiah bte Bakar v East West-UMI Insurance Bhd* [1993] 1 MLJ 39; [1992] 1 AMR 440. This is only a natural extension since the liability of the insured has been taken over by the insurer. For this reason I find that the courts below had not erred in arriving at the conclusions they did.

Second issue: Interlocutory judgment obtained before the coming into effect of s 31 of the SOSCO Act 1992

[22] The appellant then argued that he has obtained a judgment against the co-employee before s 31 in the SOSCO Act 1992 came into effect. Thus, based on the ruling in *Tan Peng Loh v Lee Aik Fong & Anor*, the appellant is not prohibited from recovering from the co-employee. If the appellant can succeed against the co-employee, conversely he can succeed against the respondent under s 96(1) of the RTA.

[23] I again cannot subscribe to this view. I wish to point that an interlocutory judgment is a judgment for damages to be assessed (as described in *Halsbury's Laws of England* (4th Ed) Vol 28 at para 506). It is not a final decision. Not being a final decision, it cannot be used to enforce a claim against an insurer in a recovery action. This is for reason that s 96(1) of the RTA demands that the insurer do pay to the person entitled to the benefit of the judgment 'any sum payable'. This phase 'any sum payable' must surely, in my opinion, be referring to a judgment which has damages ascertained rather

than one of an interlocutory nature with damages still awaiting to be assessed. This must be the intention of the Legislature. So liability of the respondent as insurer to pay could only come into effect after damages was assessed and by the time it was assessed, s 31 of the SOSCO Act 1992 was gazetted making this new provision of the law retrospective.

Third issue: Res judicata

[24] The last contention of the appellant is this: in the negligence action, both the employer and co-employee had amended their defences to include s 31 of the SOSCO Act 1992. Though pleaded, this line of defence was not pursued. Now that the respondent has assumed the role of the employer and co-employee, this same line of defence cannot be raised again when it was previously abandoned by the employer and co-employee. In short, the respondent cannot re-agitate the same issue.

[25] I find this contention unacceptable. First, the employer did not abandon this defence in the negligence action. It was the appellant who withdrew his claim against the employer. It is therefore incorrect to allege that this issue has been litigated.

[26] Second, as regards to the co-employee, this issue was never abandoned. It was just not litigated when the appellant just obtained judgment in default against the co-employee. As this defence was never litigated or abandoned res judicata is not applicable.

CONCLUSION

[27] For reasons aforesaid, this appeal should be dismissed with costs; the order of the High Court dated 27 March 2006 affirmed and; the deposit for this appeal be paid to the respondent towards account of taxed costs.

[28] Both my sister judge, Heliliah Mohd Yusof, and brother judge, Abdul Malik Ishak, had read this judgment in draft and are associating themselves with it.

Abdul Malik Ishak JCA:

INTRODUCTION

[29] This is my supporting judgment to the well written judgment of my learned brother James Foong Cheng Yuen FCJ on an interesting subject matter which would certainly be of interest to all insurers as well as to all

insureds. This judgment brings into sharp focus the rigours of the Employee's Social Security Act 1969 ('SOCSO Act'). The plaintiff appellant sued his co-employee by the name of Ramli bin Osman in the Sessions Court at Kuala Lumpur as the first defendant and against his employer Syarikat Pengangkutan Sri Selatan Sdn Bhd as the second defendant in a civil action grounded on negligence. The plaintiff appellant whilst in the process of directing and assisting the co-employee driver in reversing the motor lorry bearing registration No WBE 3310 was hit on the leg by a gas cylinder which fell off from the back of the motor lorry when the said motor lorry hit a pot hole. As a result of that unfortunate accident, the plaintiff appellant sustained severe injuries. The plaintiff appellant sued the co-employee driver as a servant or agent of the second defendant.

[30] At the time of the unfortunate accident, which was on 12 June 1987, it transpired that the plaintiff appellant was a contributor to the Employees' Social Security and this prompted the second defendant employer to amend the statement of defence by adding the following particulars:

> (8) The defendants will aver that the plaintiff was an employee of the second defendant.
>
> (9) The plaintiff was a SOCSO contributor vide SOCSO No F3363413A.
>
> (10) The defendants will contend that the plaintiff's claim is barred by section 31 of the SOCSO Act.

[31] At the time of the accident, the relevant s 31 of the SOCSO Act was worded as follows ('original version'):

> 31 Employer's liability
>
> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person —
>
> (i) any compensation under the Workmen's Compensation Ordinance, 1952, or
>
> (ii) damages under any other law for the time being in force, in respect of an employment injury sustained as an employee under this Act.

[32] What it amounts to is this. That by virtue of the *original version* of s 31 of the SOCSO Act, the plaintiff appellant is barred from suing the second defendant who was the employer of the plaintiff appellant. The plaintiff appellant's solicitors had no choice but to withdraw the plaintiff appellant's action against the second defendant employer. This was done on 11 October 1991.

[33] It must be borne in mind that the writ action was filed in the Sessions Court at Kuala Lumpur on 14 September 1988 and it was also dated on the same day. Interestingly, the plaintiff appellant's statement of claim contained the following salient averments as seen at p 30 of the appeal record. I shall now reproduce them verbatim:

> (3) The 2nd defendant was at all material times to this action, the owner of motor lorry No: WBE 3310.
>
> (4) The 1st defendant was at all material times to this action, the servant or agent of the 2nd defendant.
>
> (6) The said accident was caused by the negligence of the 1st defendant, a servant or agent of the 2nd defendant.

[34] Now, it is quite apparent that with the withdrawal of the action by the plaintiff appellant against the second defendant employer, the above mentioned paragraphs in the statement of claim are no longer relevant because the second defendant employer is no longer in the equation. That being the case, the co-employee driver by the name of Ramli bin Osman cited as the first defendant was driving the said motor lorry on his own and not as a servant or agent of the second defendant employer.

[35] In the proceedings before the Sessions Court at Kuala Lumpur, Pacific & Orient Insurance Co Sdn Bhd, the insurers of the second defendant employer appointed a firm of solicitors Messrs RK Nathan & Co to defend the first defendant co-employee driver and the second defendant employer. It was this legal firm that discovered, in the course of the proceedings in the Sessions Court at Kuala Lumpur, that the plaintiff appellant was a contributor under the SOCSO Act and the solicitors then proceeded to amend the defence to plead the SOCSO point as alluded to earlier.

[36] Now, after the plaintiff appellant withdrew his claim against the second defendant employer, he pursued the matter against the first defendant co-employee driver. In due course, Messrs RK Nathan & Co discharged themselves from acting for the first defendant co-employee driver.

[37] The plaintiff appellant's matter then proceeded in the sessions court at Kuala Lumpur in the absence of the first defendant co-employee driver. Interlocutory judgment was entered against the first defendant co-employee driver due to non-appearance on the day of the hearing. Damages were then assessed and, finally, a judgment sum was entered against the first defendant co-employee driver. The judgment sum was transmitted to the respondent insurers namely Pacific & Orient Insurance Co Sdn Bhd but the insurers refused to make any payment. Thus, the plaintiff appellant was compelled to

file a suit against the respondent insurers in the High Court under s 96(1) of the Road Traffic Act 1987 for the recovery of the judgment sum ('the recovery action').

[38] A defence to this recovery action was eventually filed and due to the jurisdictional changes that surfaced at that point of time, an application to transfer the proceedings to the Sessions Court at Kuala Lumpur was made. In due course, the matter eventually came up for hearing at the Sessions Court at Kuala Lumpur on a number of occasions. On 30 September 2003, the plaintiff appellant's claim in the recovery action was eventually dismissed by the Sessions Court at Kuala Lumpur. Aggrieved by that decision, the plaintiff appellant filed an appeal to the High Court. Upon hearing the appeal, the High Court also dismissed the plaintiff appellant's appeal. Hence, the present appeal to this court.

[39] Now, at the time when the plaintiff appellant met with that unfortunate accident, the prevailing s 31 of the SOCSO Act was the *original version* that was reproduced earlier. And when the plaintiff appellant commenced the initial action at the Sessions Court at Kuala Lumpur against the co-employee driver and the employer as the first defendant and the second defendant respectively, the *original version* of s 31 of the SOCSO Act allowed him to pursue an action against the co-employee driver by virtue and on the strength of the case of *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ 74 (FC). In that case, Abdul Hamid Omar FJ at the court of first instance had this to say in regard to the *original version* of s 31 of the SOCSO Act (see p 75 of the report):

> In my view s 31 clearly prohibits the plaintiff or his dependants from receiving or recovering from his employer damages under any other law in respect of an employment injury sustained as an employee under the Act. The Act has very clearly extinguished the right of an employee to a common law remedy.

[40] It must be emphasised that *Tan Peng Loh* made no mention, at all, of a prohibition disallowing a worker from pursuing a claim against his fellow employee or co-worker based on the wording of the original version of s 31 of the SOCSO Act. So, being encouraged by *Tan Peng Loh*, the plaintiff appellant continued to pursue his claim against the co-employee driver as the first defendant notwithstanding the withdrawal of his claim against the second defendant employer.

[41] Events moved fast. The *original version* of s 31 of the SOCSO Act was amended by way of a publication in the *Gazette* on 20 February 1992 which disallowed an employee to even pursue a claim against his fellow employer or co-worker. This amendment was obviously made to whittle down and

circumvent the decision of *Tan Peng Loh*. Of significance is this. That the amendment was made retrospective to take effect from 1 of July 1985 which meant that the amendment went far back to a date before the plaintiff appellant had that unfortunate accident. Legally speaking the amendment would have prevented the plaintiff appellant from filing the initial action on 14 September 1988. The *amended* s 31 of the SOCSO Act reads as follows:

> 31 Liability of employer and his servant
>
> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act.

[42] According to Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* at p 188:

> A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective or retroactive.

[43] In *West v Gwynne* [1911] 2 Ch 1 (CA), Buckley LJ had this to say at p 12 of the report:

> As ((sic) (a)) matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe the section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning.

[44] And even in an Act which is held to be retrospective, Bowen LJ in *Reid v Reid* (1886) 31 Ch D 402 at p 409 said:

> That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.

[45] In *The Queen, on the Prosecution of Certain Justices of Leeds v Vine* (1875) LR 10 QB 195, s 14 of the Wine and Beer Amendment Act 1870 which provided that 'every person convicted of felony shall for ever be disqualified from selling spirits by retail' and if he should take out or have

taken out a licence for that purpose it should be void, was held to apply to a man who had been convicted before, but had obtained a licence after the Act was passed, apparently on the ground that the object of the Act was to protect and ensure that public beer houses were not kept by men of bad character.

[46] In *Re a Solicitor's Clerk* [1957] 1 WLR 1219, the disciplinary committee of the Law Society made an order under the Solicitors (Amendment) Act 1956 s 11(1), directing that without the permission of the Law Society no solicitor should thereafter employ the appellant, an unadmitted solicitor's clerk, who had been convicted of larceny in 1953. In reply to the contention that the committee was giving retrospective effect to the 1956 Act, it was held that the order was valid even though the Act was not retrospective.

[47] Here, the amended s 31 of the SOCSO Act was made retrospective by way of a *Gazette* notification dated 20 February 1992 and it was to take effect from 1 July 1985 and I must give effect to it. There are no two ways about it.

[48] What it boils down to is this. That the plaintiff appellant cannot sue his employer (the second defendant) or his co-employee driver (the first defendant) and for these reasons the insurers Pacific & Orient Insurance Co Sdn Bhd are reluctant to pay the plaintiff appellant the judgment sum in question.

[49] Going on an uphill task, learned counsel for the plaintiff appellant invited this court to make a decision on an issue which, according to him, have eluded both the bar and the bench over the past 30 years because wrong presumptions have been made regarding the interpretation of the original version of s 31 of the SOCSO Act. With respect, the late Tara Singh Sidhu in *Tan Peng Loh* made a valiant attempt of this nature but Wan Suleiman FJ delivering the judgment of the Federal Court held that an action against the employer under the original version of s 31 of the SOCSO Act bars the employee from suing the employer.

[50] And the same issue was raised, once again, in *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269 at pp 269–270, where Salleh Abas FJ who delivered the judgment of the Federal Court aptly said:

> There are two previous decisions of the Federal Court on s 31 of this Act. The first decision is the case of *Che Noh bin Yacob v Seng Hin Rubber (M) Sdn Bhd* [1982] 1 MLJ 80 in which the court held that ss 31 and 42 bar an insured person from suing his employer in respect of an employment injury suffered by him. In the second decision in the case of *Tan Peng Loh v Lee Aik Fong & Anor* [1982] 1 MLJ

74 the court reiterated its earlier judgment, and further held that although an insured person cannot sue his employer for damages in respect of employment injury, s 31 does not prevent him from suing a third party, such as his co-employee, whose negligence has caused injury to him.

[51] From the decision in *Sambu Pernas* it is clear that an employee cannot sue the employer for an employment injury but the employee could obtain judgment against the co-employee then. But the employee is barred from claiming damages against the employer under vicarious liability. What this amounts to is this. That any judgment obtained against the fellow employee would be construed to be in his personal capacity and the fellow employee too would become personally liable to meet the claim.

[52] I agree with the views of my learned brother James Foong Cheng Yuen FCJ that the principle of res judicata does not apply. The second defendant employer did not abandon the defence under the original version of s 31 of the SOCSO Act in the initial action before the sessions court at Kuala Lumpur. Rather it was the plaintiff appellant who withdrew his claim against the second defendant employer. Thus, leaving intact the defence under the original version of s 31 of the SOCSO Act.

[53] And in so far as the co-employee driver who was cited as the first defendant was concerned, again the defence under the original version of s 31 of the SOCSO Act was never litigated nor abandoned. It was simply not litigated at all.

[54] Authorities on res judicata are abound. For starters, reference to the case of *Henderson v Henderson* (1843) 3 Hare 100 should be referred to. There, Wigram VC at p 115 had this to say:

The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[55] In *Satyadhyan Ghosel & Ors v Sint Deorajin Dobi & Anor* AIR 1960 SC 941 at p 943 the court said that:

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again.

[56] Lord Bingham in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at p 31; [2001] 2 WLR 72 at p 90 had this to say about res judicata:

A The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter.

[57] The case of *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 (FC) is another good illustration. There the deputy commissioner issued a writ in the Supreme Court of the Australian Capital Territory to recover the sum of $25,557.92 in unpaid income tax, naming Chamberlain as the defendant. Chamberlain owed the deputy commissioner ten times the amount claimed in the writ. He consented to judgment and paid the judgment debt. Four days later the deputy commissioner issued a second writ claiming the balance of the debt amounting to $230,021.28. The High Court unanimously held that the deputy commissioner's cause of action had merged in the earlier judgment, raising a res judicata which stopped him from vexing Chamberlain with another suit on the same cause of action.

[58] A res judicata only arises from a judgment on the merits. But no estoppel arises from: a final order which is not a judgment (*Maganja v Arthur* [1984] 3 NSWLR 561 at p 564 per Yeldham J); a verdict which was not followed by a judgment (*Basser v Medical Board of Victoria* [1981] VR 953 at p 976); an acceptance of a sum paid into court (*Cole v Austin Distributors Ltd* [1953] VLR 155 at p 158); a dismissal of an action for want of prosecution (*Pople v Evans* [1969] 2 Ch 255); and for lack of jurisdiction (*Pinnock Bros v Lewis and Peat, Ltd* [1923] 1 KB 690 at p 696).

[59] The bulk of the authorities which I have read laid down this simple principle of law. That res judicata prevents the re-agitation of the same cause of action in later proceedings. One may ask, what amounts to a cause of action? Brennan J in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at p 611 gave the following answers:

(a) it refers to the series of facts which the plaintiff must allege and prove to substantiate a right to judgment;

(b) it also refers to the legal right which has been infringed; and

(c) it makes reference to the substance of the action as distinct from its form.

[60] None of these principles would apply to the facts of the present appeal. In my judgment, res judicata do not apply in this appeal.

[61] Finally, an insurance company like Pacific & Orient Insurance Co Sdn Bhd only indemnifies the insured like the second defendant employer when there is a judgment against the insured. Here, since no judgment was obtained against the second defendant employer as the insured, there is

nothing for the insurer to indemnify. The duty of an insurer to satisfy judgment is set out in s 96(1) of the Road Transport Act 1987 which enacts as follows (the relevant parts only):

> 96 Duty of insurers to satisfy judgements against persons insured in respect of third party risks
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

[62] Thus, any action against Pacific & Orient Insurance Co Sdn Bhd — the respondent herein, must be dismissed forthwith. And this was what the High Court did.

[63] Supportive of my learned brother James Foong Cheng Yuen FCJ and for the reasons adumbrated above, I would make those orders as made by him.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed